Supreme Court, U.S.
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No. 02-987

In The

Supreme Court of the United States

RAFAEL ANTONIO FURCAL-PEGUERO,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant certiorari to consider Petitioner's equal protection claim and the related claim purportedly arising under the Civil Rights Act of 1964 when such claims were neither presented nor ruled upon by Georgia's appellate courts?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR NOT GRANTING THE WRIT 2

THIS COURT SHOULD DECLINE TO GRANT REVIEW TO CONSIDER PETITIONER'S CLAIMS AS THEY WERE NEITHER RAISED NOR RULED UPON BY EITHER OF GEORGIA'S APPELLATE COURTS 2

CONCLUSION 5

INDEX TO APPENDICES

APPENDIX A ..... App. 1

APPENDIX B ..... App. 34

APPENDIX C ..... App. 41

TABLE OF AUTHORITIES

Page

CASES

Cardinale v. Louisiana, 394 U.S. 437 (1969) 3

Furcal-Peguero v. State, 255 Ga. App. 729, 566 S.E.2d 320 (2002), *cert. denied*, No. S02C1523, 2002 Ga. LEXIS 708 (Ga. 2002) 1, 2, 3

Rodriguez v. State, 275 Ga. 283, 565 S.E.2d 458 (2002), *cert. denied*, ___ U.S. ___, 123 S. Ct. 624, 154 L. Ed. 2d 519 (Dec. 2, 2002) 3, 4

Webb v. Webb, 451 U.S. 493 (1981) 3

Wilson v. Cook, 327 U.S. 474 (1946) 3

STATUTES

28 U.S.C. § 2000d 4

O.C.G.A. § 24-9-103 ..... 2, 4

PART I.

STATEMENT OF THE CASE

Petitioner was arrested for driving under the influence of alcohol on June 10, 2000, in Cobb County, Georgia. On October 30, 2001, Petitioner was convicted of driving under the influence of alcohol following a bench trial on stipulated facts in the State Court of Cobb County. Petitioner then filed a direct appeal with the Court of Appeals of Georgia which affirmed his conviction. *Furca-Peguero v. State*, 255 Ga. App. 729, 731 (May 21, 2002). Thereafter, Petitioner filed a petition for writ of certiorari with the Georgia Supreme Court which was denied. *Furcal-Peguero v. State*, No. S02C1523, 2002 Ga. LEXIS 708 (Sept. 6, 2002).

Petitioner is now seeking review of the Georgia Supreme Court's ruling denying his petition for writ of certiorari. As Petitioner failed to articulate the arguments posited to this Court in either of Georgia's appellate courts, a detailed statement of facts surrounding Petitioner's crime (which were previously stipulated to in his bench trial before the State Court of Cobb County) is unnecessary.

PART II.

REASONS FOR NOT GRANTING THE WRIT

THIS COURT SHOULD DECLINE TO GRANT REVIEW TO CONSIDER PETITIONER'S CLAIMS AS THEY WERE NEITHER RAISED NOR RULED UPON BY EITHER OF GEORGIA'S APPELLATE COURTS.

Petitioner asks this Court to grant certiorari to review his contention that non-English speaking persons arrested for driving under the influence of alcohol (DUI) in Georgia are entitled to have the state's implied consent warning read to them in their "primary" language. Specifically, Petitioner contends that under equal protection, he, a purported non-English speaking citizen of the State of Georgia, is "similarly-situated to those defendants who can 'communicate' verbally in English or any other spoken dialect." (Petition, p. 14).

Petitioner has never argued to the Georgia appellate courts that he is similarly-situated to English speaking DUI arrestees for equal protection purposes. To the contrary, beginning with his direct appeal to the Court of Appeals of Georgia, Petitioner argued that he was denied equal protection under the United States Constitution because he "is similarly-situated to hearing impaired persons" who are entitled to have the implied consent warning translated to them pursuant to O.C.G.A. § 24-9-103. (Respondent's App. A, App. 20-27). The Court of Appeals of Georgia rejected this specific claim. *Furcal-Peguero v. State*, 255 Ga. App. 729, 731 (2002). Thereafter, Petitioner filed an unsuccessful motion for reconsideration with the court of appeals, again urging that "a non-English speaking person is similarly situated with a hearing-impaired person." (Resp. App. B, App. 36-37).

Upon conclusion of his appeal to the Court of Appeals of Georgia, Petitioner sought a petition for writ of certiorari with the Georgia Supreme Court. Therein, Petitioner again argued for equal protection purposes that he was similarly-situated with a hearing-impaired person. (Resp. App. C, App. 43 (enumeration A), 50-59). This petition was denied. *Furcal-Peguero v. State*, No. S02C1523, 2002 Ga. LEXIS 708 (Ga. 2002).

Neither in the Court of Appeals of Georgia nor the Georgia Supreme Court did Petitioner ever argue that he is similarly-situated to English speaking persons. He now attempts to raise this argument for the first time before this Court.

Because Petitioner failed to raise this claim in the appellate courts of Georgia, this Court should deny the instant petition for certiorari as this Court "will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). *See Wilson v. Cook*, 327 U.S. 474, 483-484 (1946). Moreover, where the federal question presented was not raised in the state courts below, this Court has previously held that it is without jurisdiction to hear the case. *Webb v. Webb*, 451 U.S. 493 (1981).

Respondent suggests that the reason for Petitioner's substitution as to which group he is similarly-situated with is likely due to this Court's recent denial of certiorari to another Georgia DUI defendant. In *Rodriguez v. State*, 275 Ga. 283, 565 S.E.2d 458 (2002), *cert. denied*, ___ U.S. ___, 123 S. Ct. 624, 154 L. Ed. 2d 519 (Dec. 2, 2002), the petitioner sought review from this Court on the basis that under equal protection, he, a non-English speaking DUI defendant, was similarly-situated to a hearing-impaired

defendant, and therefore, O.C.G.A. § 24-9-103 was unconstitutional. Therein, Petitioner Rodriguez was represented by the same counsel now representing Petitioner Furcal-Peguero. Respondent suggests that perhaps Petitioner's substitution is an attempt to avoid the import of this Court's decision in *Rodriguez*. However, this change raises a claim not previously raised or considered by Petitioner in the Georgia appellate courts.

Likewise, to the extent Petitioner alleges that he has established national origin discrimination under Section 601 of Title VI of the Civil Rights Act of 1964, 28 U.S.C. § 2000d, this claim was never raised nor considered in the Georgia appellate courts.

For these reasons, the Court should decline to grant certiorari.

CONCLUSION

Wherefore, for all the foregoing reasons, Respondent prays that this Court decline to grant certiorari to review the decision of the Georgia Supreme Court denying Petitioner's application for a writ of certiorari.

Respectfully submitted,

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RESP. APPENDIX A

IN THE COURT OF APPEALS
STATE OF GEORGIA

RAFAEL ANTONIO FURCAL-PEGUERO,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

Case No. A02A0792

APPELLANT'S BRIEF

(Filed Dec. 31, 2001)

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PART I

I. TABLE OF CONTENTS

PART I

I. TABLE OF CONTENTS 2

II. STATEMENT OF FACTS 3

PART II

I. ENUMERATION OF ERRORS..... 13
II. STATEMENT OF JURISDICTION 16
III. STANDARD OF REVIEW 16

PART III.

I. ARGUMENT AND CITATION OF AUTHORITY.... 17
II. CONCLUSION 49
III. CERTIFICATE OF SERVICE 50

IN THE COURT OF APPEALS
STATE OF GEORGIA

RAFAEL ANTONIO FURCAL-PEGUERO, Appellant,	:	Case No.: A02A0792
v.	:	
STATE OF GEORGIA, Appellee.	:	

II. STATEMENT OF FACTS

In this case, the State and the Appellant, Mr. Furcal-Peguero, agreed to a bench trial on a single count of DUI pursuant to stipulated facts. (R. at 233). It was the intentions of the parties, that if a conviction occurred, Mr. Furcal-Peguero would appeal the trail court's ruling on certain pre-trial motions related to the admissibility of Mr. Furcal-Peguero's blood alcohol level as determined by the

state administered chemical breath test. (R. at 233, 238-43).

In exchange for the case being tried on stipulated facts and without a jury the State agreed to proceed only on count two of the accusation, per se DUI under O.C.G.A. § 40-6-391(a)(5). (R. at 233). Before trial, the State nol prossed and dismissed all of the remaining counts of the accusation. (R. at 233; T.[1] at 20).

The trial court considered several legal challenges without hearing any testimony from any witnesses. Instead, the trial court based its ruling on the stipulated facts contained in a written motion signed by the parties and entitled "Stipulated Facts and Consent to Try Case as a Bench Trial." (R. 233, 238-43). In the motion, the parties stipulated to the following facts as being "controlling, complete and binding" in this case:

1. On June 10, 2000, Mr. Furcal-Peguero did operate a motor vehicle on Floyd Road, within Cobb County, Georgia (R. at 234).

2. Cobb County police were called to a Kroger store parking log at 4455 Floyd Road, Mableton, Georgia, by a concerned citizen who reported his suspicion that Mr. Furcal-Peguero may have stolen the automobile he was driving, a 1995 Mercedes. (R. at 234). The caller also reported that the vehicle had a dealer drive-out tag, and was leaking fluid from beneath the vehicle. (R. at 234).

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[1] Hereinafter "T" refers to the transcript of the bench trial on stipulated facts held before the Honorable Robert E. McDuff on October 20, 2001 in the city of Marietta, Cobb County, Georgia.

The caller to the Cobb County police communicated no allegation of possible impaired driving by Mr. Furcal-Peguero during this initial telephone call. (R. at 234).

3. Upon their arrival, Sgt. A.M. Marchetta, Officer W. T. Desaussure and Officer P. Geuze of the Cobb County police discovered Mr. Furcal-Peguero standing outside the vehicle. (R. at 234). The Cobb County Police also discovered that Mr. Furcal-Peguero, who was 19 years old at the time, possessed a valid Georgia's driver's license. (R. at 234).

4. A puddle of fluid (engine oil from a damaged oil pan) had accumulated from the underside of the Mercedes, and a fluid trail led back out to the adjacent street. (R. at 234). However, the automobile was not running when the police arrived. (R. at 24).

5. Upon further investigation, the Cobb County police concluded that the vehicle was not stolen, and instead, was rightfully in Mr. Furcal-Peguero's possession. (R. at 234).

6. Because the investigating officers noticed symptoms that were possibly indicative of alcohol consumption, the officer investigated Mr. Furcal-Peguero for driving under the influence. (R. at 235).

7. During the investigation, the arresting officer was able to determine that Mr. Furcal-Peguero spoke broken English, and that English was his second language. (R. at 235). Mr. Furcal-Peguero's performance on the field tests revealed indications that he could not fully comprehend the instructions of how to perform the evaluations, as given to him in English. (R. at 235).

8. Following the administration of field evaluations, Sgt. Marchetta advised Mr. Furcal-Peguero of the following implied consent rights under O.C.G.A. §§ 40-5-55 and 40-5-67.1:

> Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.02 grams or more, your Georgia driver's license or privilege to drive on the highways of this state will be suspended and, if you are convicted of having such an alcohol concentration, will be revoked. After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath, urine or other bodily substances at your own expense and from qualified personnel of your choosing. Will you submit to the state administered chemical tests of your BREATH under the implied consent law?

(R. at 235-36). The advisement takes one to two minutes to read in its entirety. (R. at 236).

9. The parties stipulated that the Georgia driver's license examination is offered to non-English speaking applicants in the native language of that person. (R. at 236). Mr. Furcal-Peguero's first and "native language" is Spanish. (R. at 236). Mr. Furcal-Peguero is a native of the Dominican Republic. (R. at 236).

10. Additionally, the parties stipulated that for approximately 10 years prior to Mr. Furcal-Peguero's arrest, Cobb County had subscribed to and made available to all of its employees (including Cobb County police officers) the services of "Language Line," an international language translation service which is accessible to subscribers and their employees via telephone by merely dialing a toll free number, providing the customer account number and requesting translation of one of over 140 languages. (R. at 236). The service, which costs the County approximately $2.00 per minute of actual use, was available and readily accessible to the Cobb County police on the evening of June 10, 2000, and this fact was known to all three Cobb County police officers who investigated the call pertaining to Mr. Furcal-Peguero. (R. at 236-37). Telephones were readily available either from use of cell phones at the scene, the pay phones at Kroger or via the business phones inside the Kroger store. (R. at 237). Furthermore, Mr. Furcal-Peguero posed no safety threat to the three Cobb County police officers such that use of a telephone translation service would have been impractical. (R. at 237).

11. The arresting officer read Mr. Furcal-Peguero the implied consent rights at the Kroger parking lot after Mr. Furcal-Peguero was placed under arrest. (R. at 237). The arresting officer read the rights only in English and only one time. (R. at 237). Furthermore, the officer made no effort to obtain a Spanish translation. (R. at 237).

12. Mr. Furcal-Peguero neither asked for nor was offered a translator. (R. at 237). Mr. Furcal-Peguero ultimately did take the State's breath test. (R. at 237). The parties agreed that the breath test results were the *sine*

qua non of the State's case against Mr. Furcal-Peguero for DUI under O.C.G.A. § 40-6-391(a)(5). (R. at 237).

13. Furthermore, the parties agreed that at the time of his arrest in June of 2000, Mr. Furcal-Peguero had significant difficulty comprehending English (and especially complex terminology and concepts) and had significant difficulty speaking English fluently, and that his comprehension of English was so marginal that being permitted to hear the implied consent advisements in Spanish would have appreciably assisted him in understanding his legal rights, including his right to refuse to submit to a chemical test under Georgia's implied consent law, his right to obtain independent tests, etc. (R. at 237). In other words, while Mr. Furcal-Peguero could comprehend some basic words in English, his meaningful understanding of his options and obligations under Georgia's implied consent would have been significantly enhanced by being able to hear the implied consent advisements in Spanish, before having to decide whether to submit to the breath test. (R. at 237).

Additionally, the trial court considered several legal challenges to the admissibility of Mr. Furcal-Peguero's blood alcohol level as determined by the state administered chemical breath test. The parties stipulated that the Appellant, Mr. Furcal-Peguero, has either raised in written form or by oral motion in limine (or, by alternative motion to suppress) each and every challenge as set forth in the motion entitled "Stipulated Facts and Consent to Try Case as a Bench Trial." (R. at 238-43). The State and the Appellant, Mr. Furcal-Peguero, agreed that the appellate courts should consider each basis or ground for challenge to be an independent legal argument by Defendant

seeking the overturn of the ruling in ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

After considering the stipulated facts contained in the motion entitled "Stipulated Facts and Consent to Try Case as a Bench Trial" and the legal arguments of the parties, the trial court found the evidence of Mr. Furcal-Peguero's blood alcohol level admissible pursuant to the existing case authority in ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986). (R. at 20).

The trial court then found Mr. Furcal-Peguero guilty of count two of the accusation, per se DUI under O.C.G.A. § 40-6-391(a)(5). (T. at 20). The trial court sentenced Mr. Furcal-Peguero to twenty-four (24) hours incarceration. (T. at 24). Additionally, Mr. Furcal-Peguero was sentenced to the statutory minimum requirements for a first DUI conviction including, eleven (11) months and twenty-nine (29) days probation, and required him to complete a drug and alcohol evaluation and any recommended treatment, submit to random alcohol and drug testing, and complete forty (40) hours of community service. (T. at 24).

PART II

I. ENUMERATION OF ERRORS

A. The trial court erred in finding that the State had meet [sic] its burden in showing that Appellant, Mr. Furcal-Peguero, had knowingly waived his right to an additional chemical test under O.C.G.A. § 40-6-392(a), when Mr. Furcal was informed of his implied consent rights in English only, without the benefit of a translation into Spanish and without any effort by

the arresting officer to obtain such a translation even though such a translation was readily available.

B. The trial court erred in denying Appellant's Motion to Suppress or Motion in Limine because Mr. Furcal-Peguero, who is similarly situated to hearing impaired persons, was denied equal protection under the State and Federal Constitution, when pursuant to O.C.G.A. §§ 24-9-100 through 24-9-103, 40-5-55(b), and 40-6-392(a)(3) the Appellant's disparate treatment as a language impaired or non-English speaking person is based on nationality, a suspect classification.

C. The trial court erred in denying Appellant's Motion to Suppress or Motion in Limine because Appellant's Due Process Rights under the federal and state constitutions were violated when the arresting officer failed to adequately advise the Appellant of his right to an independent test.

D. The trial court erred in denying the Appellant's Motion to Suppress or Motion in Limine because Appellant's rights against self-incrimination under the Fifth Amendment of the Constitution of the United States of America, Ga. Const. 1983, Art. I, Sec. I, Par. XVI, or O.C.G.A. § 24-9-20 were violated when Mr. Furcal-Peguero was compelled to give self-incriminating testimony when directed to perform the breath test without being informed that the taking of such tests was voluntary or that he was entitled to an additional test.

E. The trial court erred in denying the Appellant's Motion to Suppress or Motion in Limine because the Appellant's rights against unlawful search and seizure under the Fourth Amendment of the Constitution of the United States of America and Ga. Const. 1983, Art. I, Sec. I, Par. XIII were violated when Mr. Furcal-Peguero was compelled to submit to a breath test, without being informed of his implied consent rights when the consent to take the test was not made knowingly or voluntarily.

II. STATEMENT OF JURISDICTION

Appellant shows that the Georgia Court of Appeals, rather than the Georgia Supreme Court, has jurisdiction over the above-styled action because this case does not involve issues specifically reserved to the Supreme Court by exclusive jurisdiction and pursuant to OCGA § 5-6-34(a) and Court of Appeals Rule 29.

III. STANDARD OF REVIEW

This case involved a bench trial on stipulated facts. (R. at 233). "[W]here the evidence is uncontroverted and no question regarding the credibility of witnesses is presented, the trial court's application of the law to undisputed facts is subject to de novo appellate review." ***Vansant v. State***, 264 Ga. 319, 320(1), 443 S.E.2d 474 (1994).

PART III.

I. ARGUMENT AND CITATION OF AUTHORITY

A. The trial court erred in finding that the State had meet [sic] its burden in showing that Appellant, Mr. Furcal-Peguero, had knowingly waived his right to an additional chemical test under O.C.G.A. § 40-6-392(a), when Mr. Furcal was informed of his implied consent rights in English only, without the benefit of a translation into Spanish and without any effort by the arresting officer to obtain such a translation even though such a translation was readily available.

As stipulated to by the State and the Appellant, Mr. Furcal-Peguero, and as accepted by the trial court, the following challenge to the admissibility of the blood alcohol level as determined by the state's chemical breath test was preserved for appeal. (R. at 238-40); *see* ***Richards v. State***, 269 Ga. 483, 500 S.E.2d 581 (1998).

The trial court erred in finding that the Appellant, Mr. Furcal-Peguero, was properly informed of his implied consent rights and knowingly waived his right to additional testing under O.C.G.A. § 40-6-392(a) when the arresting officer merely read the implied consent warnings once in English, without attempting to obtain a Spanish translation of the implied consent rights for Mr. Furcal-Peguero even though the officer knew that a translation service was readily and immediately available through a telephonic translation service.

"[W]here a law enforcement officer requests a person to submit to a chemical test because of acts alleged to have been committed while operating a motor vehicle under the

influence of alcohol or drugs, and the officer arrests that person on this ground, OCGA § 40-6-392(a)(4) . . . requires that the officer inform him at the time of arrest of his right to an independent chemical analysis to determine the amount of alcohol or drugs present in his blood." ***Perano v. State***, 250 Ga. 704, 708, 300 S.E.2d 668 (1983). Failure to convey to the driver the implied consent rights renders the results of the state-administered test inadmissible in evidence. ***Vandiver v. State***, 207 Ga.App. 836(1), 429 S.E.2d 318 (1993); ***State v. Dull***, 176 Ga.App. 152, 154, 335 S.E.2d 605 (1985); ***Pruitt v. State***, 203 Ga.App. 125(2), 416 S.E.2d 524 (1992).

This Court explained the rationale for the implied consent rights in ***Nelson v. State***, 135 Ga.App. 212, 217 S.E.2d 450 (1975). "Under the former law . . . , a person arrested for DUI did not have a right to have an additional test made at the time of his arrest. [Cit.] Under the present law, this right is established. The state's 'justifiable failure or inability to obtain the additional test' must logically be preceded by the [defendant's] request for same. And the *sine qua non* of his request for the additional test would be his knowledge of his right to it. How is he to know of this right? Ordinarily, a person is presumed to know the law and his rights secured thereby. [Cits.] But where the statute itself provides that a person 'shall' be advised of his rights under the law, the legislature obviously meant to abrogate this presumption and replace it with the requirement that notice be given. Thus, it was necessary, under this statute, for the arresting officer to notify the appellant of his right to have an additional test made . . . [and] that this right be made known to the defendant at the time of his arrest. . . . In the absence of

the advice, the intoximeter test results are inadmissible." ***Id.*** at 213.

The trial court denied the Appellant's challenge to the failure to the officer to convey the implied consent rights in Spanish based on the holding in the case of ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

In ***Tosar***, the defendant did not understand the implied consent rights read to him because he understood very little English. ***Id.*** at 886. The trial court suppressed the results of the breath test after finding that the State had failed to meet its burden of properly informing the defendant of his implied consent rights. ***Id.*** In ***Tosar***, this Court recognized that the officer failed to advise the suspect of his rights, but found that the failure was justified because, pursuant to O.C.G.A. §40-5-55(b) a non-English speaking driver, falls within a limited category of people deemed, as a matter of law, not to have revoked their implied consent because of 'a condition rendering [such person] incapable of refusal.'" ***Id.*** at 887.

This Court's reasoning in ***Tosar***, which equated a non-English speaking person with an unconscious person, is flawed because a non-English speaking person is certainly *capable* of understanding their implied consent rights, refusing to take the chemical test, or requesting an additional test ***when the implied consent rights are translated to them in their language***.

For instance, hearing impaired persons are similarly situated to non-English or language impaired persons in so far as both are unable to understand the spoken language without translation. As discussed in more detail in the next section of this brief dealing with the equal protection challenge, the legislature has adopted special

requirements for ***conveying*** through a qualified interpreter the implied consent rights to a hearing impaired person. *See generally* O.C.G.A. §§ 24-9-100 through 24-9-103. Thus, non-English or language impaired persons are not any more "incapable of refusing" than hearing impaired persons. Given the special rules controlling law enforcement officers communicating these same implied consent rights to hearing impaired persons, the legislature did not intent [sic] to lump all persons who are "incapable of comprehending [their] rights when read to [them]" into the category reserved for dead or unconscious persons.

This Court in ***Tosar*** also reasoned that the non-English speaking or language impaired person's inability to communicate with the officer invoked the provisions of O.C.G.A. §40-6-392(a)(3), which provides:

> "The ***justifiable*** failure or inability to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer."

(emphasis added) ***Id.*** at 888. This Court reasoned that "[w]here the law enforcement officer cannot communicate with the suspect because the suspect cannot speak English, ***any*** failure to obtain an additional test is justified and the results of the state-administered tests are admissible." (emphasis added) ***Id.*** While the statute refers to a "justifiable" failure, this Court created a blanket rule allowing "any" failure when it applied that statute to a non-English speaking person. This blanket rule is not supported by the clear language of the statute which applies only to a "justifiable" failure.

Furthermore, in ***Tosar***, this Court used an "exigent circumstances" rationale to support the new blanket rule.

For instance, this Court reasoned that, as a matter of law, an "exigent circumstance" exception existed for language impaired or non-English speaking drivers based on the need to prevent destruction of evidence (which may occur by the dissipation of alcohol from a DUI suspect's blood while a warrant is obtained) ***while a foreign language translator was obtained***.

This "exigent circumstances" rationale is flawed for two reasons. First, the same rationale is not applied to hearing impaired persons who are guaranteed the right to a qualified interpreter despite the danger of destruction of evidence which may occur by the dissipation of alcohol while a translator is located. *See generally* O.C.G.A. §§ 24-9-100 through 24-9-103. Secondly, the "exigent circumstances" rationale assumes that obtaining a foreign language translation is impractical and time-consuming. In this case, the officer could have obtained a foreign language translation, and obtaining such a translation would have been both practical and readily available, as stipulated by the State. (R. at 237). Thus, the blanket rule in ***Tosar*** must be overruled or at least modified because its rationalizations and assumptions are inapplicable in this case, as applied to these facts.

At the time ***Tosar*** was decided, it may have been difficult or impractical to physically locate and obtain a foreign language translator to translate the implied consent rights in a timely manner. However, the same is not true today, as the stipulated facts of this case clearly demonstrate.

Tosar was decided in 1986, before foreign language translation services became readily available to law enforcement officers. However, for the past decade, foreign

language translation services have been ***instantly*** available to Cobb County police officers by simply using the nearest telephone. No delay in procuring a chemical sobriety test can now be asserted by the State as a constitutionally valid justification for a blanket denial of these rights.

In fact, in this case, the State stipulated to the fact that for approximately 10 years prior to Mr. Furcal-Peguero's arrest, Cobb County had subscribed to and made available to all of its employees (including Cobb County police officers) the services of "Language Line," an international language translation service which is accessible to subscribers and their employees via telephone by merely dialing ***a toll free number***, providing the customer account number and requesting translation of one of over 140 languages. (R. at 236). The service, which costs the County approximately $2.00 per minute of actual use, was available and readily accessible to the Cobb County police on the evening of June 10, 2000, and this fact was known to all three Cobb County police officers who investigated the call pertaining to Mr. Furcal-Peguero. (R. at 236-37).

It was further stipulated that telephones were readily available either from use of cell phones at the scene, the pay phones at Kroger or via the free business phones inside the Kroger store. (R. at 237). Finally, the parties stipulated that Mr. Furcal-Peguero posed no safety threat to the three Cobb County police officers such that use of a telephone translation service would have been impractical. (R. at 237).

Despite the fact that the translation services were readily available, the arresting officer made absolutely no effort to obtain a Spanish translation of the implied

consent rights for Mr. Furcal-Peguero. (R. at 237). The officer made no such effort even though he had determined that Mr. Furcal-Peguero spoke only broken English, and that English was his second language. (R. at 235). The officer was also aware that Mr. Furcal-Peguero's performance on the field tests revealed that *he could not fully* ***comprehend*** *the instructions* of how to perform the evaluations, as given to him in English. (R. at 235).

Under the facts of this case, Mr. Furcal-Peguero did not fall under the category of "dead, unconscious, or otherwise incapable of refusal" pursuant to O.C.G.A. § 40-5-55(b). A language impaired or non-English speaking driver is capable of refusal and capable of understanding his implied consent rights when reasonable accommodations are made to obtain a translation of those rights, which in this case would mean a translation of Mr. Furcal-Peguero's implied consent rights into Spanish. Such reasonable accommodations are already required for hearing impaired persons. *See generally* O.C.G.A. §§ 24-9-100 through 24-9-103.

It is also important to note that Mr. Furcal-Peguero was language impaired because of his race and national origin. Mr. Furcal-Peguero is a native of the Dominican Republic. (R. at 236). His first and native language is Spanish. (R. at 236). On the night of his arrest, Mr. Furcal-Peguero had significant difficulty comprehending and speaking English. (R. at 237). In fact, his comprehension of English was "marginal." (R. at 237). In essence, Mr. Furcal-Peguero was not provided with an opportunity to understand his implied consent rights because of his race and nationality. There can be no justification for interpreting the statute in a manner which would discriminate against non-English speaking or language impaired

persons on the basis of race or national origin. Yet, that is exactly the holding of the ***Tosar*** decision, which the police officer in the instant case relied upon in making no effort to obtain a Spanish translation of the implied consent warnings. (R. at 237).

Under the facts of this case, no "exigent circumstances" exception could exist because, even the State has agreed and stipulated that the translation was readily available and not impractical. Mr. Furcal-Peguero was effectively denied his opportunity to make a knowing and intelligent decision about whether to submit to the breath test and whether to request an additional chemical test.

Therefore, the trial court erred in finding that the Appellant, Mr. Furcal-Peguero, was properly informed of his implied consent rights and knowingly waived his right to additional testing under O.C.G.A. § 40-6-392(a) when the arresting officer merely read the implied consent warnings once in English, without attempting to obtain a Spanish translation of the implied consent rights for Mr. Furcal-Peguero even though the officer knew that a translation service was both practical and readily available.

The standards set in other states recognize the importance of requiring that the implied consent rights are conveyed in the language spoken by the driver. For instance, in ***People v. Niedzwiecki***, 127 Misc.2d 919, 922, 487 N.Y.S.2d 694, 696 (1985), the New York court required a knowing refusal based on warnings in the driver's language "[n]otwithstanding the daily practicalities and the financial and logistical problems involved in preparing the police for all the various languages and dialects that

surface in New York." In requiring the translation for non-English speaking or language impaired drivers, the court reasoned that "if a defendant is to be faced with a decision, the results of which will be used as prima facie evidence against him in any subsequent criminal proceeding, he must reach a threshold point of understanding the choice presented to him, so he may at least be able to make a decision as to the course of conduct he will take." ***Id.***

Likewise, in ***People v. Wegielnik***, 562 N.E.2d 573, 205 Ill.App.3d 191 (1990), the Illinois court found that a driver cannot have his license suspended for refusing to take a chemical test unless the request for the test was given to him in a language that he can understand. Furthermore, the court recognized that "[p]ublic policy in Illinois permits drivers who speak languages other than English to secure a license using those languages." ***Id.***

The same public policy exists in Georgia. As stipulated to by the State, the Georgia driver's license examination is offered to non-English speaking applicants in the native language of that applicant. (R. at 236). The same public policy considerations mandate that Mr. Furcal-Peguero should have been provided with a Spanish translation of his implied consent rights before he was deemed to have waived his right to an independent chemical test. Since the translation service was both ***practical*** under the circumstances and ***readily available*** to the arresting officer, the officer's failure to provide the translation services render the results of the state administered chemical breath test inadmissible. Clearly this failure by the officer was not justified, "as applied" to the facts of this case.

Thus, this Court should hold that under the particular facts of this case, the officer's failure to obtain a readily available foreign translation of Mr. Furcal-Peguero's implied consent rights was unjustified under the circumstances and requires the suppression of the breath results.

B. The trial court erred in denying Appellant's Motion to Suppress or Motion in Limine because Mr. Furcal-Peguero, who is similarly situated to hearing impaired persons, was denied equal protection under the State and Federal Constitution, when pursuant to O.C.G.A. §§ 24-9-100 through 24-9-103, 40-5-55(b), and 40-6-392(a)(3) the Appellant's disparate treatment as a language impaired or non-English speaking person is based on nationality, a suspect classification.

As stipulated to by the State and the Appellant, Mr. Furcal-Peguero, and as accepted by the trial court, the following challenge to the admissibility of the blood alcohol level is determined by the State's chemical breath test was preserved for appeal. (R. at 238-41).

The effect of the code sections at issue is to deprive Mr. Furcal-Peguero of the equal protection of the laws in violation of both the state and federal constitutions. *See* 1983 Ga. Const., art. I, sec. I, par. II.; U.S. Const. amend. XIV, § 1.

The equal protection clause of the Georgia Constitution is "substantially equivalent" to the equal protection clause of the fourteenth amendment of the U.S. Constitution. *See* ***Barge-Wagener Constr. Co. v. Morales***, 263 Ga. 190, 429 S.E.2d 671 (1993); ***McDaniel v. Thomas***, 248 Ga. 632, 638, 285 S.E.2d 156 (1981); ***Suber v.***

Bulloch County Bd. of Educ., 722 F.Supp. 736 (S.D.Ga.1989).

When considering an equal protection challenge, the proper inquiry is whether the statute applies equally to all those accused under it, and therefore does not create disparate classifications among similarly situated persons. ***Sims v. State***, 260 Ga. 782(1), 399 S.E.2d 924 (1991).

The statute, O.C.G.A. § 24-9-103, violates the equal protection clause of the Georgia Constitution and the Fourteenth Amendment to the United States Constitutions because it provides preferential treatment to persons who are hearing impaired, while not providing the same treatment to similarly situated persons who are language impaired. Language impaired or non-English speaking person's [sic] are similarly situated to hearing impaired persons in that both cannot readily understand or communicate in the spoken language when the arresting officer reads to them their implied consent rights without the help of a translator. A classification which treats hearing impaired persons differently from similarly situated language impaired or non-English speaking persons involves a suspect classification. Therefore, language impaired or non-English speaking persons are entitled to the same measure of justice and the same equal protection of the law that hearing impaired persons are afforded under Georgia statutory law.

Pursuant to O.C.G.A. § 24-9-100, "[i]t is the policy of the State of Georgia to secure the rights of hearing impaired persons who, because of impaired hearing, ***cannot readily understand or communicate in the spoken language*** and who cannot equally participate or benefit from proceedings, programs, and activities of the courts,

legislative bodies, administrative agencies, licensing commission, departments, and boards of the state and its subdivision unless qualified interpreters are available to assist them." (Emphasis added).

O.C.G.A. § 24-9-103(b)(1) also provides that a hearing impaired person, upon being placed into custody, has a right to no interrogation, warning, information of rights, taking of statements, or other investigatory procedure to be undertaken ***until a qualified interpreter has been provided***. Hence, the provisions of O.C.G.A. § 24-9-103 are clearly applicable to any hearing impaired person taken into custody for allegedly violating any criminal law. ***Yates v. State***, 248 Ga.App. 35, 545 S.E.2d 169 (2001) (applied to the implied consent rights of a DUI suspect); ***State v. Woody***, 215 Ga.App. 448, 450, 449 S.E.2d 615 (1994).

Being "hearing impaired" does ***not*** require a ***complete absence of hearing ability***, but only an impairment that prohibits the person from understanding oral communications when spoken in normal conversational tone. O.C.G.A. § 24-9-101(3); ***Yates*** at 37. Furthermore, the requirements in the statute are ***mandatory***, and if not met, the evidence acquired by law enforcement officers is not admissible under the statute. ***Id.***

This court has previously stated that, "[a]s with hearing persons, the implied consent rights must be conveyed to the hearing impaired person; the only means of conveying those rights sanctioned by the hearing impaired law is by a sign language interpreter." ***Allen v. State***, 218 Ga.App. 844, 846, 463 S.E.2d 522 (1995). Likewise, this Court must recognize that implied consent

rights must be conveyed to the language impaired or non-English speaking person; ***the only means of conveying those rights is by a foreign language interpreter***.

Hearing impaired persons are treated differently from language impaired or non-English speaking persons who cannot readily understand or communicate in the spoken language under O.C.G.A. § 24-9-103 and O.C.G.A. § 40-5-55. Mr. Furcal-Peguero is similarly situated to defendants who are hearing impaired because he was not able to readily understand or communicate in the spoken language. Additionally, Mr. Furcal-Peguero is subject to disparate treatment because the Georgia statutory scheme under which he is charged does not provide him with the right to have his important implied consent rights translated to him in his native language, Spanish. In other words, the implied consent rights were clearly not ***conveyed*** to Mr. Furcal-Peguero because he could only marginally understand English. The only way to have conveyed the implied consent rights to Mr. Furcal-Peguero, who was similarly situated with a hearing impaired person, was through a translator.

Under an equal protection analysis, the appropriate standard of scrutiny must be determined. However, in this case, the classification system which provides disparate treatment to non-English speaking or language impaired persons would fail ***any*** standard of scrutiny.

"There are three standards generally accepted for determining constitutionality under the Equal Protection Provisions of both the U.S. and [Georgia] Constitutions: (1) the rational relationship test; (2) The intermediate level of scrutiny; and (3) the strict judicial scrutiny standard.

Under the rational relationship test a statutory classification is presumed valid and will comport with constitutional standards as long as it bears a reasonable relationship to a legitimate governmental purpose. The intermediate level of judicial scrutiny requires that a classification be substantially related to an important governmental objective. (Citation and punctuation omitted.) ***McDaniel v. Thomas***, 248 Ga. 632, 638, 285 S.E.2d 156 (1981).

"Under the strict judicial scrutiny standard, which is employed when a classification involves socially stigmatic inequalities, such as those based on race . . . the governmental classification will fall unless the government demonstrates that the classification is necessarily related to a compelling governmental objective." ***Id.*** (citing ***San Antonio School District v. Rodriguez***, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); ***Graham v. Richardson***, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); ***Shapiro v. Thompson***, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969)); *see also* ***Parks v. State***, 254 Ga. 403, 330 S.E.2d 686 (1985).

"Application of the strict scrutiny test means that the classification is not entitled to the usual presumption of validity and that the State bears the burden of proving that the classification system 'has been structured with "precision" and is "tailored" narrowly to serve legitimate objectives and that it has selected the less "drastic means" for effectuating its objectives.'" ***Id.*** (Citations omitted).

The current Georgia statutes set up a ***suspect classification*** that requires strict scrutiny. In this case, the classification system set up for hearing impaired persons excludes language impaired or non-English speaking

persons from the protections offered and legally guaranteed to hearing impaired persons. The decisions of the U.S. Supreme Court have clearly established the classifications based on national origin or race, are inherently suspect and subject to close judicial scrutiny. ***Graham v. Richardson***, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971). Language impaired or non-English speaking persons as a class are a prime example of a "discrete and insular" minority for whom such heightened judicial solicitude is appropriate. ***Id.***

The Supreme Court of the United States recognized the close nexus between the ability to speak English and ethnicity in ***Hernandez v. New York***, 500 U.S. 352, 371-72, 111 S.Ct. 334 (1973). In ***Hernandez***, the Supreme Court noted in the context of jury selection "that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis." ***Hernandez v. New York***, 500 U.S. 352, 371-72, 111 S.Ct. 334 (1973). Additionally, federal courts have noted that "the Fourteenth Amendment clearly extends to protection of any group of persons invidiously discriminated against by state law including groups identifiable by ethnic, national origin, or ***linguistic characteristics***." (emphasis added) ***United States v. Uvalde Consol. Indep. Sch. Dist.***, 625 F.2d 547, 553 (5th Cir. 1980).

The "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." ***Kiyoshi Hirabayashi v. United State*** [sic], 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774, 1786 (1943). Of course, "an individual's primary language skills generally flows from his or her national origin." ***Olagues v. Russoniello***, 797 F.2d 1511, 1520 (9th Cir. 1986),

vacated on grounds of mootness, 484 U.S. 806, 108 S.Ctr. [sic] 1278, 1294, 36 L.Ed2d 16, 40 (1973).

In this case, not only is there no compelling state interest in failing to provide a non-English speaking person with a translation of their implied consent rights, there is not even a legitimate governmental purpose for such treatment. In the instant case, we have a person who did not speak or understand English fluently and who was not provided a translation of his implied consent rights after an arrest for DUI. Relying on the ***Tosar*** decision, the arresting officer made ***absolutely no effort*** to obtain a translation of Mr. Furcal-Peguero's important legal rights. (R. at 236).

On the other hand, hearing impaired persons, who would also be unable to fully understand their implied consent rights are accorded the benefit of a mandatory translation by a qualified translator. There is no justification for this distinction between classifications of persons who bear such significant similarities.

A person's inability to speak and understand English because of their national origin places the person within a suspect class for purposes of equal protection analysis. The facts of this case compel that ***Tosar*** be revisited and overturned, or at least modified to end the blanket policy of law enforcement officers' taking the meaningless step of reading important legal rights in English to language impaired or non-English speaking persons who would [sic] are unable to comprehend the meaning and significance of those rights without a translation. The constitutional infirmity of such a blanket policy is clearly revealed by the compelling facts of this case.

What we have in this controversy are two similarly situated persons, the hearing impaired person and the non-English speaking person, both of whom are unable to understand a police officer's reading of the implied consent rights. However, the statute provides ***dissimilar*** treatment of these similarly situated persons. Hearing impaired persons are afforded a *mandatory* translation while non-English speaking persons are absolutely denied a translation of their implied consent rights. the ***Tosar*** decision gives the police the right, as a matter of law, to recite the implied consent warnings in English only, even if the suspect is totally incapable of deciphering a single word of the advisements. Clearly, this is unequal treatment for which no compelling (or even legitimate) state interest justifies providing disparate treatment based on race and nationality to language impaired or non-English speaking persons.

This dissimilar treatment rises to the level of constitutional impermissibility. This conduct is violative of the Equal Protection provisions of both the Georgia Constitution and the Fourteenth Amendment of the United States Constitution.

C. The trial court erred in denying Appellant's Motion to Suppress or Motion in Limine because the Appellant's Due Process Rights under the federal and state constitutions were violated when the arresting officer failed to adequately advise the Appellant of his right to an independent test.

As stipulated to by the State and the Appellant, Mr. Furcal-Peguero, and as accepted by the trial court, the following challenge to the admissibility of the blood alcohol

level as determined by the state's chemical breath test was preserved for appeal. (R. at 238-41).

The United States Constitution prohibits any state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, sec. 1; Ga. Const.Art. I, Sec. I, Para. I. The fundamental idea of due process is notice and an opportunity to be heard. ***Citizens & Contractors Bank v. Maddox***, 175 Ga. 779, 784-85, 166 S.E. 227 (1932).

The statutory scheme which permitted the arresting officer to fail to convey the implied consent rights to Mr. Furcal-Peguero violates due process because the scheme is arbitary [sic] and capricious. State legislation is constitutional with respect to due process if it bears a rational relation to a proper and constitutionally permitted legislative purpose. ***State v. Major***, 243 Ga. 255, 257, 253 S.E.2d 724 (1979).

In this case, as discussed in the previous section, the statutory scheme which permits officers to fail to advise a non-English speaking or hearing impaired person of their implied consent rights does not bear any rational relation to a proper and constitutionally permitted legislative purpose. Under this scheme, the Georgia driver's license examination is offered to non-English speaking applicants in the native language of that applicant. (R. at 236). However, no such translation is required for the implied consent rights of non-English speaking or language impaired persons. Since the translation service was both ***practical*** under the circumstances and ***readily available*** to the arresting officer, the officer's failure to provide the translation services render the results of the state administered chemical breath test inadmissible. Clearly

this failure by the officer was not justified, "as applied" to the facts of this case.

D. The trial court erred in denying the Appellant's Motion to Suppress or Motion in Limine because the Appellant's rights against self-incrimination under the Fifth Amendment of the Constitution of the United States of America, Ga. Const. 1983, Art. I, Sec. I, Par. XVI, or O.C.G.A. § 24-9-20 were violated when Mr. Furcal-Peguero was compelled to give self-incriminating testimony when directed to perform the breath test without being informed that the taking of such tests was voluntary or that he was entitled to an additional test.

As stipulated to by the State and the Appellant, Mr. Furcal-Peguero, and as accepted by the trial court, the following challenge to the admissibility of the blood alcohol level as determined by the state's chemical breath test was preserved for appeal. (R. at 238-41).

The State's use of the breath sample as evidence against Mr. Furcal-Peguero violated his rights against self-incrimination under the state and federal constitutions. 1983 Ga. Const. Art. I, § I, Para. XVI.; O.C.G.A. § 24-9-20.

The statutory scheme which allows an officer to fail to convey the implied consent rights to a non-English speaking or language impaired person is so misleading or incomplete that no real choice exists. In essence, this is a case where the legislature has "subtly coerced [a defendant] into choosing the option it had no right to compel, rather than offering a true choice." ***South Dakota v. Neville***, 459 U.S. 553, 563, 103 S.Ct. 916, 74 L.Ed.2d 748

(1983); ***Wessels v. State***, 169 Ga.App. 246(1), 312 S.E.2d 361 (1983).

The trial court erred in denying the Appellant's Motion to Suppress or Motion in Limine in finding that the Appellant's rights against self-incrimination under the due process clause of the federal and state constitutions were not violated when Mr. Furcal-Peguero was compelled to give self-incriminating testimony when directed to perform the breath test without being informed that the taking of such tests was voluntary or that he was entitled to an additional test.

E. The trial court erred in denying the Appellant's Motion to Suppress or Motion in Limine because the Appellant's rights against unlawful search and seizure under the Fourth Amendment of the Constitution of the United States of America and Ga. Const. 1983, Art. I, Sec. I, Par. XIII were violated when Mr. Furcal-Peguero was compelled to submit to a breath test, without being informed of his implied consent rights when the consent to take the test was not made knowingly or voluntarily.

As stipulated to by the State and the Appellant, Mr. Furcal-Peguero, and as accepted by the trial court, the following challenge to the admissibility of the blood alcohol level was determined by the state's chemical breath test was preserved for appeal. (R. at 238-41).

Because chemical testing of an individual's blood, breath or urine implicates Fourth Amendment rights, any consent thereto must be made knowingly and voluntarily. *See* ***Raulerson v. State***, 268 Ga. 623, 491 S.E.2d 791

(1997); ***State v. Johnston***, 249 Ga. 413, 291 S.E.2d 543 (1982). Mr. Furcal-Peguero's consent to take the breath test was not made knowingly or voluntarily because his implied consent rights were not conveyed to him in words and language that he could comprehend. Thus, the trial court erred in denying the Appellant's Motion to Suppress or Motion in Limine in finding that Mr. Furcal-Peguero's rights against unlawful search and seizure were not violated when Mr. Furcal-Peguero was compelled to submit to a breath test, without meaningfully being informed of his implied consent rights.

II. CONCLUSION

Mr. Furcal-Peguero was denied the right, afforded to English speaking and hearing impaired drivers, to have the officer convey his implied consent rights to him before he was asked to submit to a breath test. Under the facts of this case, as applied, Mr. Furcal-Peguero's "consent" to the breath test was not made knowingly or voluntarily.

This Court's decision in ***Tosar***, and the statutory scheme in Georgia sets up a blanket rule which denies equal protection to non-English speaking or language impaired persons based on national origin in violation of the equal protection and due process clauses under the state constitution. Moreover, the statutory scheme also violates clear constitutional precedent under both the equal protection clause and the due process clause of United States Constitution. The breath test in this case should have been suppressed, and trial court's failure to suppress the breath test requires that this case be reversed.

Respectfully submitted this 31st day of December, 2001.

/s/ [Illegible]
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IN THE COURT OF APPEALS
STATE OF GEORGIA

RAFAEL ANTONIO FURCAL-PEGUERO,	:	
Appellant,	:	
v.	:	Case No.: A02A0792
STATE OF GEORGIA,	:	
Appellee.	:	

III. CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Appellant's Brief upon the [sic] Barry Morgan, Solicitor of the State Court of Cobb County, by depositing a copy of same in the United States mail with sufficient first class postage affixed and addressed to: 12 East Park Square, Marietta, GA 30090.

Dated: December 31, 2001

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RESP. APPENDIX B

IN THE COURT OF APPEALS
STATE OF GEORGIA

RAFAEL ANTONIO FURCAL-PEGUERO,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

Case No. A02A0792

APPELLANT'S MOTION
FOR RECONSIDERATION

(Filed May 31, 2002)

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IN THE COURT OF APPEALS
STATE OF GEORGIA

RAFAEL ANTONIO FURCAL-PEGUERO, Appellant,	:	Case No. A02A0792
v.	:	
STATE OF GEORGIA, Appellee.	:	

MOTION FOR RECONSIDERATION

COMES NOW, Appellant who respectfully requests that this Honorable Court reconsider its decision of May 21, 2002, in the above referenced case.

As a preliminary matter, this Court failed to issue any ruling on three of the five enumerated errors properly raised by the Appellant. In its opinion, this Court recognized that Mr. Furcal-Peguero enumerated five errors. ***Furcal-Peguero v. State***, ___ Ga.App. ___, *5, ___ S.E.2d ___ (Case No. A02A0792; May 21, 2002). This Court then failed to address, in any manner whatsoever, the last three errors raised by Mr. Furcal-Peguero.

This Court must now grant this motion for reconsideration and issue an opinion on whether Mr. Furcal-Peguero's conviction must be reversed because of the last three errors raised by Mr. Furcal-Peguero. Specifically, this Court must decide the following: (1) whether Mr. Furcal-Peguero's due process rights were violated when the officer failed to adequately inform him of his implied consent rights; (2) whether Mr. Furcal-Peguero's rights

against self-incrimination were violated when Mr. Furcal-Peguero was compelled to take the breath test without being adequately informed of his implied consent rights; and (3) whether Mr. Furcal-Peguero's rights against unlawful search and seizures were violated when he was compelled to submit to the breath test, without being adequately informed of his implied consent rights.

Secondly, this Court failed to issue an opinion on whether Mr. Furcal-Peguero's rights to equal protection under the State Constitution and the Federal Constitution was violated. Instead, this Court merely noted that Georgia law requires a limited accommodation for hearing impaired drivers because it is an immutable physical disability. ***Id.*** at *8. Then, this Court concluded that "[t]he results of the State-administered test is admissible in this case because Furcal consented to chemical intoxication tests by driving on Georgia's roads, because the officer properly advised Furcal of his implied consent rights, and because Furcal did not withdraw his consent." ***Id.*** at *9-10. Finally, this Court concluded that "[t]he trial court did not err in admitting the results of the state administered breath-test." ***Id.*** at *10.

This court opinion on the equal protection challenge raised by Mr. Furcal-Peguero is wholly inadequate. The first step in any equal protection analysis is to determine whether the alleged constitutional violation involves individuals who are similarly situated as to the subject matter of the legislation. *See* ***Etkind v. Suarez***, 271 Ga. 352, 355(3), 519 S.E.2d 210 (1999); *see also* ***Zach, Inc. v. Fulton County***, 235 Ga.App. 478-479(1), 509 S.E.2d 746 (1998). Thus, this Court must determine whether a non-English speaking person is similarly situated with a

hearing-impaired person in that neither are able to understand their implied consent rights without an interpreter.

The second step in an equal protection analysis is to determine the level of scrutiny to be applied in determining whether the disparate treatment is justifiable. ***Sisson v. State***, 232 Ga.App. 61, 53, 499 S.E.2d 422 (1998). There are three levels of scrutiny generally accepted for determining constitutionality under the Equal Protection Provisions of both the U.S. and Georgia Constitutions: (1) the rational relationship test; (2) the intermediate level of scrutiny; and (3) the strict judicial scrutiny standard. ***Id.***

The final step of an equal protection analysis requires that this Court apply the appropriate level of scrutiny to determine whether the state interest justifies providing disparate treatment to hearing impaired persons compared with the treatment provided to non-English speaking persons. ***See id.*** Under the statutory scheme, only the former are entitled under the law to a translation of their implied consent rights. This Court must now reconsider its decision of May 21, 2002, and issue an opinion that properly considers the equal protection challenge.

Finally, this Court refused to consider the first enumeration of error that the trial court erred in finding that the State had meet [sic] its burden in showing that Appellant, Mr. Furcal-Peguero, had knowingly waived his right to an additional chemical test under O.C.G.A. § 40-6-392(a), when Mr. Furcal-Peguero was informed of his implied consent rights in English only, without the benefit of any attempt to make a translation into Spanish and without any effort by the arresting officer to obtain such a translation even though such a translation was readily and immediately available. "[T]he *sine qua non* of [the

driver's] request for the additional test would be his knowledge of his right to it." ***Nelson v. State***, 135 Ga.App. 212, 213, 217 S.E.2d 450 (1975). Because Mr. Furcal-Peguero's implied consent rights were not conveyed to him in a language that he could understand and because he could not communicate with the officer to request an additional test, he could not be deemed to have waived his right to an additional chemical test.

Although not discussed by this court in its opinion of May 21, 2002, in ***Tosar*** this Court addressed this issue by reasoning that the non-English speaking driver's inability to communicate with the officer invoked the provisions of O.C.G.A. § 40-6-392(a)(3) which refers to "the justifiable failure or inability" to obtain an additional test. 180 Ga.App. 885, 888, 350 S.E.2d 811 (1986). The ***Tosar*** court then reasoned that "[w]here the law enforcement officer cannot communicate with the suspect because the suspect cannot speak English, any failure to obtain an additional test is justified and the results of the state-administered tests are admissible. ***Id.*** The ***Tosar*** court justified this holding under an "exigent circumstances" rationale based on the need to prevent destruction of evidence which may occur by the dissipation of alcohol from a DUI suspect's blood while a foreign language translator was obtained. ***Id.***

Likewise, this Court invoked the "exigent circumstances" rationale in this case reasoning that "[b]ecause removing impaired drivers from our highways and roads is a critical public safety function, and because the level of alcohol or drugs in a person's blood, breath, or urine inevitably changes over time, police officers must be able to initiate the evidence collection process without unreasonable delay." (citations omitted) ***Id.*** at *8-9. Of course,

this rationale ignores the fact that in this case, the translation service was readily available and immediately accessible to the officer. (R. at 236). Furthermore the officer was aware of the translation service and under the circumstances of this case the use of the translation service would not have been impractical. (R. at 236-237). Thus, the "exigent circumstances" rationale invoked in ***Tosar*** has absolutely no relevancy in a case in which a translation service is ***immediately*** available. Thus, this Court should reconsider its opinion of May 21, 2002, and address the fact that the "exigent circumstances" rationale has no application under the facts of this case. Furthermore, this Court should hold that under the facts of this case, the officer's failure to obtain a translation of the implied consent rights was not justified, rendering the breath test results inadmissible.

Respectfully submitted this 31st day of May.

/s/ [Illegible]
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IN THE COURT OF APPEALS
STATE OF GEORGIA

RAFAEL ANTONIO FURCAL-PEGUERO,	:	
Appellant,	:	
v.	:	Case No.: A02A0792
STATE OF GEORGIA,	:	
Appellee.	:	

III. CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Appellant's Motion for Reconsideration upon the [sic] Barry Morgan, Solicitor of the State Court of Cobb County, by depositing a copy of same in the United States mail with sufficient first class postage affixed and addressed to: 12 East Park Square, Marietta, GA 30090.

Dated: May 31, 2002

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RESP. APPENDIX C

IN THE GEORGIA SUPREME COURT
APPLICATION NO. ___

RAFAEL ANTONIO FURCAL-PEGUERO,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

PETITION FOR A WRIT OF CERTIORARI

Court of Appeals Case No. A02A0792

Supreme Court Case No. _____

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APPLICATION FOR CERTIORARI

COMES NOW the Petitioner, by counsel, and requests that the Supreme Court issue a Writ of Certiorari to the Georgia Court of Appeals to review the decision of that Court on the above referenced criminal case dated May 21, 2002, reconsideration denied, June 12, 2002. Thus, this Petition for Certiorari is timely filed pursuant to Supreme Court Rule 38. A true and accurate copy of the decision complained of is attached hereto (See Exhibit "A").

This Petitioner [sic] for Certiorari should be granted because the issues involved in this case concern the rights of a "Non-English" speaking driver under suspicion for DUI under the implied consent statutes of this state. This Court has already granted Certiorari in a case involving similar facts, ***Omar Rodriguez v. The State***, Supreme Court Case No. S02A0412. This Court should also grant certiorari in this case because the issues presented herein are more clearly presented in this case involving stipulated facts than in ***Omar Rodriguez v. The State***, Supreme Court Case No. S02A0412.

STATEMENT OF JURISDICTION

This Petition for Certiorari is based upon erroneous application of existing Georgia case law. *See* ***Southern Guaranty Insurance Company of Georgia v. Goddard***, 259 Ga. 257, 379 S.E.2d 778 (1989). The circumstances of the case are of "great concern, gravity, and importance to the public." ***Country Club Apartments, Inc. v. Scott***, 246 Ga. 443, 271 S.E.2d 841 (1980).

ENUMERATION OF ERROR

A. The Court of Appeals erred in failing to hold that Petitioner's equal protections rights were violated when Petitioner, as a non-English speaker who is similarly situated to a hearing impaired person, was given disparate treatment when the police officer made absolutely no effort to advise Petitioner of his implied consent warnings through a translator.

B. The Court of Appeals erred when it held that because Petitioner did not request an independent test, O.C.G.A. § 40-6-392(a)(3) had "no application" even though Petitioner was a non-English speaker who could not *knowingly* waive his right to an independent test when the police officer made absolutely no attempt to obtain a translation of the implied consent rights even though the officer knew that such a translation service was practical and immediately available.

II. STATEMENT OF FACTS

In this case, the State and the Appellant, Mr. Furcal-Peguero, agreed to a bench trial on a single count of DUI pursuant to stipulated facts. (R. at 233). It was the intention of the parties, that if a conviction occurred, Mr. Furcal-Peguero would appeal the trial court's ruling on certain pre-trial motions related to the admissibility of Mr. Furcal-Peguero's blood alcohol level as determined by the state administered chemical breath test. (R. at 233, 238-43).

In exchange for the case being tried on stipulated facts and without a jury, the State agreed to proceed only

on count two of the accusation, per se DUI under O.C.G.A. § 40-6-391(a)(5). (R. at 233). Before trial, the State nol prossed and dismissed all of the remaining counts of the accusation. (R. at 233; T.[1] at 20).

The trial court considered several legal challenges without hearing any testimony from any witnesses. Instead, the trial court based its ruling on the stipulated facts contained in a written motion signed by the parties and entitled "Stipulated Facts and Consent to Try Case as a Bench Trial." (R. 233, 238-43). In the motion, the parties stipulated to the following facts as being "controlling, complete and binding" in this case:

1. On June 10, 2000, Mr. Furcal-Peguero did operate a motor vehicle on Floyd Road, within Cobb County, Georgia (R. at 234).

2. Cobb County police were called to a Kroger store parking lot at 4455 Floyd Road, Mableton, Georgia, by a concerned citizen who reported his suspicion that Mr. Furcal-Peguero may have stolen the automobile he was driving, a 1995 Mercedes. (R. at 234). The caller also reported that the vehicle had a dealer drive-out tag, and was leaking fluid from beneath the vehicle. (R. at 234). The caller to the Cobb County police communicated no allegation of possible impaired driving by Mr. Furcal-Peguero during this initial telephone call. (R. at 234).

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[1] Hereinafter "T" refers to the transcript of the bench trial on stipulated facts held before the Honorable Robert E. McDuff on October 20, 2001 in the city of Marietta, Cobb County, Georgia.

3. Upon their arrival, Sgt. A.M. Marchetta, Officer W. T. DeSaussure and Officer P. Geuze of the Cobb County police discovered Mr. Furcal-Peguero standing outside the vehicle. (R. at 234). The Cobb County police also discovered that Mr. Furcal-Peguero, who was 19 years old at the time, possessed a valid Georgia driver's license. (R. at 234).

4. A puddle of fluid (engine oil from a damaged oil pan) had accumulated from the underside of the Mercedes, and a fluid trail led back out to the adjacent street. (R. at 234). However, the automobile was not running when the police arrived. (R. at 234).

5. Upon further investigation, the Cobb County police concluded that the vehicle was not stolen, and instead, was rightfully in Mr. Furcal-Peguero's possession. (R. at 234).

6. Because the investigating officers noticed symptoms that were possibly indicative of alcohol consumption, the officer investigated Mr. Furcal-Peguero for driving under the influence (R. at 235).

7. During the investigation, the arresting officer was able to determine that Mr. Furcal-Peguero spoke broken English, and that English was his second language (R. at 235). Mr. Furcal-Peguero's performance on the field tests revealed indications that he could not fully comprehend the instructions of how to perform the evaluations, as given to him in English (R. at 235).

8. Following the administration of field evaluations, Sgt. Marchetta advised Mr. Furcal-Peguero of the following implied consent rights under O.C.G.A. §§ 40-5-55 and 40-5-67.1:

> Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.02 grams or more, your Georgia driver's license or privilege to drive on the highways of this state will be suspended and, if you are convicted of having such an alcohol concentration, will be revoked. After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath, urine or other bodily substances at your own expense and from qualified personnel of your choosing. Will you submit to the state administered chemical tests of your BREATH under the implied consent law?

(R. at 235-36). The advisement takes one to two minutes to read in its entirety (R. at 236).

9. The parties stipulated that the Georgia driver's license examination is offered to non-English speaking applicants in the native language of that person. (R. at 236). Mr. Furcal-Peguero's first and "native language" is Spanish. (R. at 236). Mr. Furcal-Peguero is a native of the Dominican Republic. (R. at 236).

10. Additionally, the parties stipulated that for approximately 10 years prior to Mr. Furcal-Peguero's arrest, Cobb County had subscribed to and made available to all of its employees (including Cobb County police

officers) the services of "Language Line," an international language translation service which is accessible to subscribers and their employees via telephone by merely dialing a toll free number, providing the customer account number and requesting translation of one of over 140 languages. (R. at 236). The service, which costs the County approximately $2.00 per minute of actual use, was available and readily accessible to the Cobb County police on the evening of June 10, 2000, and this fact was known to all the three Cobb County police officers who investigated the call pertaining to Mr. Furcal-Peguero. (R. at 236-37). Telephones were readily available either from use of cell phones at the scene, the pay phones at Kroger or via the business phones inside the Kroger store. (R. at 237). Furthermore, Mr. Furcal-Peguero posed no safety threat to the three Cobb County police officers such that use of a telephone translation service would have been impractical. (R. at 237).

11. The arresting officer read Mr. Furcal-Peguero the implied consent rights at the Kroger parking lot after Mr. Furcal-Peguero was placed under arrest. (R. at 237). The arresting officer read the rights only in English and only one time. (R. at 237). Furthermore, the officer made no effort to obtain a Spanish translation. (R. at 237).

12. Mr. Furcal-Peguero neither asked for nor was offered a translator. (R. at 237). Mr. Furcal-Peguero ultimately did take the State's breath test. (R. at 237). The parties agreed that the breath test results were the *sine qua non* of the State's case against Mr. Furcal-Peguero for DUI under O.C.G.A. § 40-6-391(a)(5). (R. at 237).

13. Furthermore, the parties agreed that at the time of his arrest in June of 2000, Mr. Furcal-Peguero had

significant difficulty comprehending English (and especially complex terminology and concepts) and had significant difficulty speaking English fluently, and that his comprehension of English was so marginal that being permitted to hear the implied consent advisements in Spanish would have appreciably assisted him in understanding his legal rights, including his right to refuse to submit to a chemical test under Georgia's implied consent law, his right to obtain independent tests, etc. (R. at 237). In other words, while Mr. Furcal-Peguero could comprehend some basic words in English, his meaningful understanding of his options and obligations under Georgia's implied consent would have been significantly enhanced by being able to hear the implied consent advisements in Spanish, before having to decide whether to submit to the breath test. (R. at 237).

Additionally, the trial court considered several legal challenges to the admissibility of Mr. Furcal-Peguero's blood alcohol level as determined by the state administered chemical breath test. The parties stipulated that the Appellant, Mr. Furcal-Peguero, has either raised in written form or by oral motion in limine (or, by alternative motion to suppress) each and every challenge as set forth in the motion entitled "Stipulated Facts and Consent to Try Case as a Bench Trial." (R. at 238-43). The State and the Appellant, Mr. Furcal-Peguero, agreed that the appellate courts should consider each basis or ground for challenge to be an independent legal argument by Defendant seeking the overturn of the ruling in ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

After considering the stipulated facts contained in the motion entitled "Stipulated Facts and Consent to Try Case as a Bench Trial" and the legal arguments of the parties,

the trial court found the evidence of Mr. Furcal-Peguero's blood alcohol level admissible pursuant to the existing case authority in ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986). (R. at 20).

The trial court then found Mr. Furcal-Peguero guilty of count two of the accusation, per se DUI under O.C.G.A. § 40-6-391(a)(5). (T. at 20). The trial court sentenced Mr. Furcal-Peguero to twenty-four (24) hours incarceration. (T. at 24). Additionally, Mr. Furcal-Peguero was sentenced to the statutory minimum requirements for a first DUI conviction including, eleven (11) months and twenty-nine (29) days probation, and required him to complete a drug and alcohol evaluation and any recommended treatment, submit to random alcohol and drug testing, and complete forty (40) hours of community service. (T. at 24).

From this conviction and sentence, Mr. Furcal-Peguero appealed to the Court of Appeals raising several errors, including: (1) whether the disparate treatment provided to Mr. Furcal-Peguero, as a non-English speaker, violated the Equal Protection provisions of the state and federal constitutions when similarly-situated "hearing-impaired" person were entitled to a translation of their implied consent warnings, and (2) whether the trial court erred in finding that Mr. Furcal-Peguero ***knowingly*** waived his right to an additional chemical test when the police officer made no attempt to obtain a translation of implied consent warnings or provide him with a translator so that he would have the ability to communicate to the officer any request for an additional chemical test. The Court of Appeals affirmed the conviction. *See* ***Exhibit A***.

ARGUMENT AND CITATION OF AUTHORITY

A. The Court of Appeals erred in failing to hold that Petitioner's equal protections rights were violated when Petitioner, as a non-English speaker who is similarly situated to a hearing impaired person, was given disparate treatment when the police officer made absolutely no effort to advise Petitioner of his implied consent warnings through a translator.

As [sic] the heart of this appeal is one central question: Now that instantly available language translation service is available, and PRE-PAID by the state, is that service only to be used for confessions, or do our constitutional protections extend far enough to permit a non-English speaker to have language assistance at a critical post-arrest advisement of his legal rights?

The Court of Appeals in deciding this issue failed to issue an opinion on whether Mr. Furcal-Peguero's right to equal protection under the State Constitution and the Federal Constitution was violated. Instead, the Court of Appeals merely noted that Georgia law requires a limited accommodation for hearing impaired drivers because it is an immutable physical disability. ***Exhibit A*** at 8. Then the court concluded that "[t]he results of the State-administered test is admissible in this case because Furcal consented to chemical intoxication tests by driving on Georgia's roads, because the officer properly advised Furcal of his implied consent rights, and because Furcal did not withdraw his consent." ***Exhibit A*** at 9-10. Finally, the court concluded that "[t]he trial court did not err in admitting the results of the state administered breath-test." ***Exhibit A*** at 10.

The effect of the code sections at issue is to deprive Mr. Furcal-Peguero of the equal protection of the laws in violation of both the state and federal constitutions. *See* 983 Ga. Const., art. I, sec. I, par. II.; U.S. Const. amend. XIV, § 1. The equal protection clause of the Georgia Constitution is "substantially equivalent" to the equal protection clause of the fourteenth amendment of the U.S. Constitution. *See* ***Barge-Wagener Constr. Co. v. Morales***, 263 Ga. 190, 429 S.E.2d 671 (1993); ***McDaniel v. Thomas***, 248 Ga. 632, 638, 285 S.E.2d 156 (1981); ***Suber v. Bulloch County Bd. of Educ.***, 722 F.Supp. 736 (S.D.Ga.1989).

When considering an equal protection challenge, the proper inquiry is whether the statute applies equally to all those accused under it; and therefore does not create disparate classifications among similarly situated persons. ***Sims v. State***, 260 Ga. 782(1), 399 s.e.2d 924 (1991).

The Statute, O.C.G.A. § 24-9-103, violates the equal protection clause of the Georgia Constitution and the Fourteenth Amendment to the United States Constitutions because it provides preferential treatment to persons who are *hearing* impaired, while not providing the same treatment to similarly situated persons who are *language* impaired. Language impaired or non-English speaking persons's are similarly situated to hearing impaired persons in that both cannot readily understand or communicate in the spoken language when the arresting officer reads to them their implied consent rights without the help of a translator. A classification which treats hearing impaired persons differently from similarly situated language impaired or non-English speaking persons involves a suspect classification. Therefore, language impaired or non-English speaking persons are

entitled to the same measure of justice and the same equal protection of the law that hearing impaired persons are afforded under Georgia statutory law.

Pursuant to O.C.G.A. § 24-9-100, "[i]t is the policy of the State of Georgia to secure the rights of hearing impaired persons who, because of impaired hearing, *cannot readily understand or communicate in the spoken language* and who cannot equally participate or benefit from proceedings, programs, and activities of the courts, legislative bodies, administrative agencies, licensing commission, departments, and boards of the state and its subdivision unless qualified interpreters are available to assist them." (Emphasis added).

O.C.G.A. § 24-9-103(b)(1) also provides that a hearing impaired person, upon being placed into custody, has a right to no interrogation, warning, information of rights, taking of statements, or other investigatory procedure to be undertaken *until a qualified interpreter has been provided*. Hence, the provisions of O.C.G.A. § 24-9-103 are clearly applicable to any hearing impaired person taken into custody for allegedly violating any criminal law. ***Yates v. State***, 248 Ga.App. 35, 545 S.E.2d 169 (2001) (applied to the implied consent rights of a DUI suspect); ***State v. Woody***, 215 Ga.App. 448, 450, 449 S.E.2d 615 (1994). Being "hearing impaired" does *not* require a *complete absence of hearing ability*, but only an impairment that prohibits the person from understanding oral communications when spoken in normal conversational tone. O.C.G.A. § 24-9-101(3); ***Yates*** at 37. Furthermore the requirements in the statute are *mandatory*, and if not met, the evidence acquired by law enforcement officers is not admissible under the statute. ***Id.***

The Court of Appeals has previously stated that, "[a]s with hearing persons, the implied consent rights must be conveyed to the hearing impaired person; the only means of conveying those rights sanctioned by the hearing impaired law is by a sign language interpreter." ***Allen v. State***, 218 Ga.App. 844, 846, 463 S.E.2d 522 (1995). Likewise, this Court must recognize that implied consent rights must be conveyed to the language impaired or non-English speaking persons; ***the only means of conveying those rights is by a foreign language interpreter***.

Hearing impaired persons are treated differently from language impaired or non-English speaking persons who cannot readily understand or communicate in the spoken language under O.C.G.A. § 24-9-103 and O.C.G.A. § 40-5-55. Mr. Furcal-Peguero is similarly situated to defendants who are hearing impaired because he was not able to readily understand or communicate in the spoken language. Additionally, Mr. Furcal-Peguero is subject to disparate treatment because the Georgia statutory scheme under which he is charged does not provide him with the right to have his important implied consent rights translated to him in his native language, Spanish. In other words, the implied consent rights were clearly not ***conveyed*** to Mr. Furcal-Peguero because he could only marginally understand English. The only way to have ***conveyed*** the implied consent rights to Mr. Furcal-Peguero, who was similarly situated with a hearing impaired person, was through a translator.

As stipulated to by the State and the Appellant, Mr. Furcal-Peguero, and as accepted by the trial court, the following challenge to the admissibility of the results of the blood alcohol test as determined by the State's chemical breath test was preserved for appeal. (R. at 238-41).

This Court has recognized the importance of the [sic] having a statewide plan for the use of Interpreters by the Courts of Georgia "to secure the rights of non-English speaking persons." *See* ***Use of Interpreters for Non-English Speaking Persons***, Georgia Supreme Court (October 20, 2001). In defining "Non-English Speaker," this Court adopted the following definition:

> "Non-English Speaker" means any party or witness who cannot readily understand or communicate in spoken English and who consequently cannot equally participate in or benefit from the proceedings unless an Interpreter is available to assist him or her. The fact that a person for whom English should not prohibit that individual from being allowed to have an Interpreter[.]

Id. This definition of a "Non-English Speaker" closely mirrors the definition of a "Hearing-Impaired Person" as defined in ***Yates v. State***, 248 Ga.App. 35, 37, 545 S.E.2d 169 (2001) (reasoning that "hearing impaired" does not require a complete absence of hearing ability, but only an impairment that prohibits the person from understanding oral communications when spoken in normal conversation tone).

Under the rule establish [sic] by this Court, Mr. Furcal-Peguero clearly qualifies as a "non-English speaker" because it was not in dispute that "the arresting officer was able to determine that [Mr. Furcal-Peguero] spoke only broken English, and that English was his second language." (R. at 235). Furthermore, it was not in dispute that Mr. Furcal-Peguero's "performance on the field tests revealed indications that he could not fully comprehend the instructions of how to perform the evaluations, as given to him in English. (R. at 235). Finally, the

State stipulated that at the time of the arrest, Mr. Furcal-Peguero had significant difficulty comprehending English and had significant difficulty speaking English fluently. (R. at 237). In fact, Mr. Furcal-Peguero's "comprehension of English was so marginal that permitting him to hear the implied consent advisements in Spanish would have appreciably assisted him in understanding his legal rights . . . " (R. at 237). Under the facts of this case, it is undeniable that Mr. Furcal-Peguero qualifies as a "non-English speaker" who is similarly situated with a "hearing impaired" person. Thus, Mr. Furcal-Peguero should have been provided with the same access to an interpreter that a hearing impaired person would have been entitled to before the results of his state administered breath test became admissible into evidence against him.

Under an equal protection analysis, the appropriate standard of scrutiny must be determined. However, in this case, the classification system which provides disparate treatment to non-English speaking or language impaired persons would fail *any* standard of scrutiny. "There are three standards generally accepted for determining constitutionality under the Equal Protection Provisions of both the U.S. and [Georgia] Constitutions: (1) The rational relationship test; (2) The intermediate level of scrutiny; and (3) The strict judicial scrutiny standard. Under the rational relationship test a statutory classification is presumed valid and will comport with constitutional standards as long as it bears a reasonable relationship to a legitimate governmental purpose. The intermediate level of judicial scrutiny requires that a classification be substantially related to an important governmental objective. (Citation and punctuation omitted.) ***McDaniel v. Thomas***, 248 Ga. 632, 638, 285 S.E.2d 156 (1981).

"Under the strict judicial scrutiny standard, which is employed when a classification involves socially stigmatic inequalities, such as those based on race . . . the governmental classification will fall unless the government demonstrates that the classification is necessarily related to a compelling governmental objective." ***Id.*** (*citing* ***San Antonio School District v. Rodriguez***, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); ***Graham v. Richardson***, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); ***Shapiro v. Thompson***, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969)); *see also* ***Parks v. State***, 254 Ga. 403, 330 S.E.2d 686 (1985).

"Application of the strict scrutiny test means that the classification is not entitled to the usual presumption of validity and that the State bears the burden of proving that the classification system 'has been structured with "precision" and is "tailored" narrowly to serve legitimate objectives and that it has selected the less "drastic means" for effectuating its objectives.'" ***Id.*** (citations omitted).

The current Georgia statutes set up a ***suspect classification*** that requires strict scrutiny. In this case, the classification system set up for hearing impaired persons excludes language impaired or non-English speaking persons from the protections offered and legally guaranteed to hearing impaired persons. The decisions of the U.S. Supreme Court have clearly established that classifications based on national origin or race, are inherently suspect and subject to close judicial scrutiny. ***Graham v. Richardson***, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971). Language impaired or non-English speaking persons as a class are a prime example of a "discrete and insular" minority for whom such heightened judicial solicitude is appropriate. ***Id.***

The Supreme Court of the United States recognized the close nexus between the ability to speak English and ethnicity in ***Hernandez v. New York***, 500 U.S. 352, 371-72, 111 S.Ct. 334 (1973). In ***Hernandez***, the Supreme Court noted in the context of jury selection "that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis." ***Hernandez v. New York***, 500 U.S. 352, 371-72, 111 S.Ct. 334 (1973). Additionally, federal courts have noted that "the Fourteenth Amendment clearly extends to protection of any group of persons invidiously discriminated against by state law including groups identifiable by ethnic, national origin, or ***linquistic characteristics***." (emphasis added) ***United States v. Uvalde Consol. Indep. Sch. Dist.***, 625 F.2d 547, 553 (5th Cir. 1980).

The "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." ***Kiyoshi Hirabayashi v. United States***, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774, 1786 (1943). Of course, "an individual's primary language skills generally flows from his or her national origin." ***Olagues v. Russoniello***, 797 F.2d 1511, 1520 (9th Cir. 1986), *vacated on grounds of mootness*, 484 U.S. 806, 108 S.Ctr. [sic] 1278, 1294, 36 L.Ed2d 16, 40 (1973).

In this case, not only is there no compelling state interest in failing to provide a non-English speaking person with a translation of their implied consent rights, there is not even a legitimate governmental purpose for such treatment. In the instant case, we have a person who did not speak or understand English with any degree of proficiency and who was not provided a translation of his implied consent rights after an arrest for DUI. Relying on

the ***Tosar*** decision, the arresting officer made ***absolutely no effort*** to obtain a translation of Mr. Furcal-Peguero's important legal rights. (R. at 236).

On the other hand, hearing impaired persons, who would also be unable to fully understand their implied consent rights are accorded the benefit of a mandatory translation by a qualified translator. There is no justification for this distinction between classifications of persons who bear such significant similarities.

A person's inability to speak and understand English because of their national origin places the person within a suspect class for purposes of equal protection analysis. The facts of this case compel that ***Tosar*** be revisited and overturned, or at least modified to end the blanket policy of law enforcement officers' taking the meaningless step of reading important legal rights in English to language impaired or non-English speaking persons who would [sic] are unable to comprehend the meaning and significance of those rights without a translation. The constitutional infirmity of such a blanket policy is clearly revealed by the compelling facts of this case.

What we have in this controversy are two similarly situated persons, the hearing impaired person and the non-English speaking person, both of whom are unable to understand a police officer's reading of the implied consent rights. However, the statute provides ***dissimilar*** treatment of these similarly situated persons. Hearing impaired persons are afforded a *mandatory* translation while non-English speaking persons are absolutely denied a translation of their implied consent rights. The ***Tosar*** decision gives the police the right, as a matter of law, to recite the implied consent warnings in English only, even

if the suspect is totally incapable of deciphering a single word of the advisements. Clearly, this is unequal treatment for which no compelling (or even legitimate) state interest justifies providing disparate treatment based on race and nationality to language impaired or non-English speaking persons.

This dissimilar treatment rises to the level of constitutional impermissibility. This conduct violates the Equal provisions of both the Georgia Constitution and the Fourteenth Amendment of the United States Constitution.

B. Whether the Court of Appeals erred when it held that because Petitioner did not request an independent test, O.C.G.A. § 40-6-392(a)(3) had "no application" even though Petitioner was a non-English speaker who could not *knowingly* waive his right to an independent test when the police officer made absolutely no attempt to obtain a translation of the implied consent rights even though the officer knew that such a translation service was practical and immediately available.

The Court of Appeals erred in finding that because Mr. Furcal-Peguero did not request an independent test, O.C.G.A. § 40-6-392(a)(3) had "no application." Of course this analysis completely ignores the fact that the implied consent warnings were not conveyed to Mr. Furcal-Peguero in a language that he could understand, which was a fact that the State agreed was not in dispute at trial. Furthermore, the analysis of the Court of Appeals ignores the fact that Mr. Furcal-Peguero, as a non-English speaker was not in a position to "request" an independent

test because [sic] could not communicate with the officer without the assistance of a translator.

"[W]here a law enforcement officer requests a person to submit to a chemical test because of acts alleged to have been committed while operating a motor vehicle under the influence of alcohol or drugs, and the officer arrests that person on this ground, OCGA § 40-6-392(a)(4) . . . requires that the officer inform him at the time of arrest of his right to an independent chemical analysis to determine the amount of alcohol or drugs present in his blood." ***Perano v. State***, 250 Ga. 704, 708, 300 S.E.2d 668 (1983). Failure to convey to the driver the implied consent rights renders the results of the state-administered test inadmissible in evidence. ***Vandiver v. State***, 207 Ga.App. 836(1), 429 S.E.2d 318 (1993); ***State v. Dull***, 176 Ga.App. 152, 154, 335 S.E.2d 605 (1985); ***Pruitt v. State***, 203 Ga.App. 125(2), 416 S.E.2d 524 (1992).

This Court explained the rationale for the implied consent rights in ***Nelson v. State***, 135 Ga.App. 212, 217 S.E.2d 450 (1975). "Under the former law . . . , a person arrested for DUI did not have a right to have an additional test made at the time of his arrest. [Cit.] Under the present law, this right is established. The state's 'justifiable failure or inability to obtain the additional test' must logically be preceded by the [defendant's] request for same. And the *sine quo non* of his request for the additional test would be his knowledge of his right to it. How is he to know of his right? Ordinarily, a person is presumed to know the law and his rights secured thereby. [Cits.] but where the statute itself provides that a person 'shall' be advised of his rights under the law, the legislature obviously meant to abrogate this presumption and replace it with the requirement that notice be given. Thus, it was

necessary, under this statute, for the arresting officer to notify the appellant of his right to have an additional test made . . . [and] that this right to be made known to the defendant at the time of his arrest. . . . In the absence of the advice, the intoximeter test results are inadmissible." ***Id.*** at 213.

The trial court denied the Appellant's challenge to the failure to the officer to convey the implied consent rights in Spanish based on the holding in the case of ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

In ***Tosar***, the defendant did not understand the implied consent rights read to him because he understood very little English. ***Id.*** at 886. The trial court suppressed the results of the breath test after finding that the State had failed to meet its burden of properly informing the defendant of his implied consent rights. ***Id.*** In ***Tosar***, the Court of Appeals recognized that the officer failed to advise the suspect of his rights, but found that the failure was justified because, pursuant to O.C.G.A. §40-5-55(b) a non-English speaking driver, falls within a limited category of people deemed, as a matter of law, not to have revoked their implied consent because of 'a condition rendering [such person] incapable of refusal.'" ***Id.*** at 887.

The ***Tosar*** Court's attempt to equate a non-English speaking person with an unconscious person, is flawed because a non-English speaking person is certainly *capable* of understanding their implied consent rights, refusing to take the chemical test, or requesting an additional test ***when the implied consent rights are translated to them in their language***.

For instance, hearing impaired persons are similarly situated to non-English or language impaired persons in

so far as both are unable to understand the spoken language without translation. As discussed in more detail in the next section of this brief dealing with the equal protection challenge, the legislature has adopted special requirements for ***conveying*** through a qualified interpreter the implied consent rights to a hearing impaired person. *See generally* O.C.G.A. §§ 24-9-100 through 24-9-103. Thus, non-English or language impaired persons are not any more "incapable of refusing" than hearing impaired persons. Given the special rules controlling law enforcement officers communicating these same implied consent rights to hearing impaired persons, the legislature did not intent [sic] to lump all persons who are "incapable of comprehending [their] rights when read to [them]" into the category reserved for dead or unconscious persons.

This ***Tosar*** Court also reasoned that the non-English speaking or language impaired person's inability to communicate with the officer invoked the provisions of O.C.G.A. §40-6-392(a)(3), which provides:

> "The ***justifiable*** failure or inability to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer."

(emphasis added) ***Id.*** at 888. The ***Tosar*** Court reasoned that "[w]here the law enforcement officer cannot communicate with the suspect because the suspect cannot speak English, ***any*** failure to obtain an additional test is justified and the results of the state-administered tests are admissible." (emphasis added) ***Id.*** While the statute refers to a "justifiable" failure, this Court created a blanket rule allowing "any" failure when it applied that statute to a non-English speaking person. This blanket rule is not

supported by the clear language of the statute which applies only to a "justifiable" failure.

Furthermore, in ***Tosar***, the Court of Appeals used an "exigent circumstances" rationale to support the new blanket rule. For instance, it reasoned that, as a matter of law, an "exigent circumstance" exception existed for language impaired or non-English speaking drivers based on the need to prevent destruction of evidence (which may occur by the dissipation of alcohol from a DUI suspect's blood while a warrant is obtained) ***while a foreign language translator was obtained***.

This "exigent circumstances" rationale is flawed for two reasons. First, the same rationale is not applied to hearing impaired persons who are guaranteed the right to a qualified interpreter despite the danger of destruction of evidence which may occur by the dissipation of alcohol while a translator is located. *See generally* O.C.G.A. §§ 24-9-100 through 24-9-103. Secondly, the "exigent circumstances" rationale assumes that obtaining a foreign language translation is impractical and time-consuming. In this case, the officer could have obtained a foreign language translation, and obtaining such a translation would have been both practical and readily available, as stipulated by the State. (R. at 237). Thus, the blanket rule in ***Tosar*** must be overruled or at least modified because its rationalizations and assumptions are inapplicable in this case, as applied to these facts.

At the time ***Tosar*** was decided, it may have been difficult or impractical to physically locate and obtain a foreign language translator to translate the implied consent rights in a timely manner. However, the same is

not true today, as the stipulated facts of this case clearly demonstrate.

Tosar was decided in 1986, before foreign language translation services became readily available to law enforcement officers. However, for the past decade, foreign language translation services have been ***instantly*** available to Cobb County police officers by simply using the nearest telephone. No delay in procuring a chemical sobriety test can now be asserted by the State as a constitutionally valid justification for a blanket denial of these rights.

In fact, in this case, the State stipulated to the fact that for approximately 10 years prior to Mr. Furcal-Peguero's arrest, Cobb County had subscribed to and made available to all of its employees (including Cobb County police officers) the pre-paid services of "Language Line," an international language translation service which is accessible to subscribers and their employees via telephone by merely dialing ***a toll free number***, providing the customer account number and requesting translation of one of over 140 languages. (R. at 236). The service, which costs the County approximately $2.00 per minute of actual use, was available and readily accessible to the Cobb County police on the evening of June 10, 2000, and this fact was known to all three Cobb County police officers who investigated the call pertaining to Mr. Furcal-Peguero. (R. at 236-37).

The fact that the language line service is available to all officers as a pre-paid (subscribed) service, coupled with the knowledge of all three Cobb County police officers knew it was accessible to them by way of the nearest phone invokes a [sic] key questions: If you don't use the

service in situations like this, when would one use it? Is it to be used by police officers ONLY FOR CONFESSIONS?

It was further stipulated that telephones were readily available either from use of cell phones at the scene, the pay phones at Kroger or via the free business phones inside the Kroger store. (R. at 237). Finally, the parties stipulated that Mr. Furcal-Peguero posed no safety threat to the three Cobb County police officers such that use of a telephone translation service would have been impractical. (R. at 237).

Despite the fact that the translation services were readily available, the arresting officer made absolutely no effort to obtain a Spanish translation of the implied consent rights for Mr. Furcal-Peguero. (R. at 237). The officer made no such effort even though he had determined that Mr. Furcal-Peguero spoke only broken English, and that English was his second language. (R. at 235). The officer was also aware that Mr. Furcal-Peguero's performance on the field tests revealed that *he could not fully* ***comprehend*** *the instructions* of how to perform the evaluations, as given to him in English. (R. at 235).

Under the facts of this case, Mr. Furcal-Peguero did not fall under the category of "dead, unconscious, or otherwise incapable of refusal" pursuant to O.C.G.A. § 40-5-55(b). A language impaired or non-English speaking driver is capable of refusal and capable of understanding his implied consent rights when reasonable accommodations are made to obtain a translation of those rights., which in this case would mean a translation of Mr. Furcal-Peguero's implied consent rights into Spanish. Such reasonable accommodations are already required

for hearing impaired persons. *See generally* O.C.G.A. §§ 24-9-100 through 24-9-103.

It is also important to note that Mr. Furcal-Peguero was language impaired because of his race and national origin. Mr. Furcal-Peguero is a native of the Dominican Republic. (R. at 236). His first and native language is Spanish. (R. at 236). On the night of his arrest, Mr. Furcal-Peguero had significant difficulty comprehending and speaking English. (R. at 237). In fact, his comprehension of English was "marginal." (R. at 237). In essence, Mr. Furcal-Peguero was not provided with an opportunity to understand his implied consent rights because of his race and nationality. There can be no justification for interpreting the statute in a manner which would discriminate against non-English speaking or language impaired persons on the basis of race or national origin. Yet, that is exactly the holding of the ***Tosar*** decision, which the police officer in the instant case relied upon in making no effort to obtain a Spanish translation of the implied consent warnings. (R. at 237).

Under the facts of this case, no "exigent circumstances" exception could exist because, even the State has agreed and stipulated that the translation was readily available and not impractical. Mr. Furcal-Peguero was effectively denied his opportunity to make a knowing and intelligent decision about whether to submit to the breath test and whether to request an additional chemical test.

Therefore, the Court of Appeals erred in finding that the Appellant, Mr. Furcal-Peguero, was properly informed of his implied consent rights. Furthermore, the Court of Appeals erred in dismissing Mr. Furcal-Peguero's argument that he did not ***knowingly*** waive his right to

additional testing under O.C.G.A. § 40-6-392(a) when the arresting officer merely read the implied consent warnings once in English, without attempting to obtain a Spanish translation of the implied consent rights for Mr. Furcal-Peguero even though the officer knew that a translation service was both practical and readily available.

Public policy in 2002, supports this Court's adopting Mr. Furcal-Peguero's position because as the State stipulated in this case, the Georgia driver's license examination is offered to non-English speaking applicants in the native language of that applicant. (R. at 236). Undoubtedly, confessions are translated when the police determine the translation services are needed. The same public policy considerations mandate that Mr. Furcal-Peguero should have been provided with a Spanish translation of his implied consent rights before he was deemed to have waived his right to an independent chemical test. Since the translation service was both ***practical*** under the circumstances and ***readily available*** to the arresting officer, the officer's failure to provide the translation services was unreasonable under the circumstances, rendering the results of the state administered chemical breath test inadmissible. Clearly this failure by the officer was not justified, "as applied" to the facts of this case.

WHEREFORE, based on the foregoing argument and citation of law, Petitioner requests that this Court should grant this petition for a writ of certiorari, and find that under the particular facts of this case, the officer's failure to make any attempt to obtain a readily available foreign translation of Mr. Furcal-Peguero's implied consent rights

was unjustified under the circumstances and requires the suppression of the breath results.

Respectfully submitted,

/s/ [Illegible]
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IN THE GEORGIA SUPREME COURT

RAFAEL ANTONIO FURCAL-PEGUERO,	:	
Appellant,	:	Court of Appeals Case No.: A02A0792
v.	:	
STATE OF GEORGIA,	:	
Appellee.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petitioner [sic] for a Writ of Certiorari upon the [sic] Barry Morgan, Solicitor of the State Court of Cobb County, by depositing a copy of same in the United States mail with sufficient first class postage affixed and addressed to: 12 East Park Square, Marietta, GA 30090.

Dated: June 24, 2001

/s/ [Illegible]
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